JOHORE REPORTS.

[ORIGINAL CIVIL JURISDICTION]

MILLS, J.

February 21, 1938.

TEE SAY POH v. JAIS BIN HAJI SALLEH.

[BATU PAHAT CIVIL SUIT No. 8 of 1937]

Recovery of Possession of Land—Trespasser no rights in State Land—No Constructive Notice by unlawful occupation—Rights of bona fide purchaser for value—Priority of Equities—Specific Relief where third parties involved—F.M.S. Specific Relief Enactment, Sections 18 (a) and 27 (b)—Limitation Enactment, Articles 105 and 112.

In 1914 Y. applied for permission to clear a certain piece of State Land. In 1920 the defendant occupied the land and remained in occupation until sued for possession by the plaintiff. In 1935 Y. applied for permission to occupy the land and, upon obtaining approval of his application, sold his rights to the plaintiff by means of an "Agreement of Sale and Power of Attorney" which instrument was duly noted in the Register of Applications to occupy land. The defendant contended that Y. had agreed in 1920 to obtain rights over the land and transfer them to him and that the plaintiff was aware of the rights which he (the defendant) had thereby derived from Y.

Held, distinguishing **Tan Ho Cher Trading etc. v. Yeo Poh**, (1 J.L.R. 48; 1 M.L.J. 48) that as an unlawful occupier of State land is a trespasser and cannot, as such, acquire any rights in the land, his mere occupation cannot be deemed constructive notice of rights to a person claiming possession.

Held further (i) that the rights of a transferee for value who has paid the purchase price in good faith must prevail over those claimed through an earlier contract of which the transferee had had no notice; (2) that the English rule of Equity which regards as done that which ought to be done, in relation to a contract for the sale of land, cannot be invoked against a stranger to the contract; (3) that, as an approved occupant of land has, upon compliance with certain formalities, the right to obtain a title by Entry in the Mukim Register, his equity must prevail over one which, though prior in time, is unsupported by any legal rights.

Held also that on a plea of Limitation by a person in adverse possession, the time which runs against a plaintiff claiming as the transferee of the rights of occupation, is regulated by Article 105, and not by Article 112 of the Limitation Enactment.

TRIAL OF ACTION.

The facts and arguments sufficiently appear from the Judgment.

MacIntyre for plaintiff.

Chia for defendant.

Mills, J.—In this suit the plaintiff sues for possession of the land comprised in Lot 1524 in Mukim X in the District of Batu Pahat.

The defendant alleges that he has a right to possession by virtue of an agreement of sale executed by the approved occupant named Yas.

I will first set out the uncontested facts.

The land in question is State land. Originally it was illegally occupied by Yas.

In 1914 the Penghulu, Haji Suleiman, apparently satisfied himself that Yas was entitled to apply for a permit to clear the land, for on the 1st April, 1914, he wrote in his so-called "permit" (Ex. 7), "Yas bin Haji Abu is required to obtain permit from the Government according to the Land Enactment". (It has not been shown that either Yas or the defendant actually obtained a permit to clear the land).

In 1920, the defendant cleared the land and fully planted coconuts, areca-nuts and coffee: in the same year he built a house on the land: he has renewed the house 3 times.

He knew from the beginning that Yas had no title to the land.

He has never paid any rent for the land.

In 1925 he obtained a Surat Sementara for Lot 1519: he transferred his rights in 1933.

In 1927 he obtained a Surat Sementara for Lot 1523: he transferred his rights in 1928.

In 1927 he obtained a Surat Sementara for Lot 1525: he transferred his rights in 1933.

Lots 1519, 1523 and 1525 adjoin Lot 1524.

In November, 1935, Yas (still having no authority to occupy Lot 1524) asked the plaintiff to buy it. The plaintiff, wishing first to see the land, visited it with Yas and the then Penghulu, named Majid.

There was a partly-built house there in the apparent occupation of the defendant.

The plaintiff agreed to buy the land for $300 and to pay all the costs of getting a title.

On the 4th November, 1935, the plaintiff went to the Land Office with Yas and Abdul Hamid (the son of Penghulu Majid, and now Naib Penghulu).

At the Land Office the plaintiff paid $50 on account of premium: about a week later he paid a further sum of $55.50 to the Land Office.

Since then the plaintiff has paid the rent for 1936 and 1937.

On the 4th November, 1935, Yas applied to the Land Office for permission to occupy the land.

On the 9th November, 1935, all outstanding dues having been paid, the Collector approved Yas' application to occupy the land.

On the 17th November, 1935, Yas executed in favour of the plaintiff a so-called "Agreement of Sale and Power of Attorney" (Ex. E), and on the 30th November, 1935, this instrument was noted in the register of applications to occupy land called "Daftar Permohonan".

About the 22nd November, 1935, the plaintiff called upon the defendant to give him possession of the land: the defendant refrained from doing so: after various criminal and civil proceedings the plaintiff brings the present suit.

Yas has not been seen for some time.

I now consider certain contested facts

(1) that on the 12th November, 1920, Yas agreed to obtain rights over the land and transfer them to the defendant

(2) that in November, 1935, the plaintiff knew that the defendant had rights over the land.

The evidence is as follows:—

The defendant testifies that on the 12th November, 1920, Yas agreed that, in consideration of $200, he would transfer his rights to the defendant as soon as he obtained a "gran": the defendant supports his statement by producing a document (Ex. 6) to that effect: he alleges that this document was executed by himself and Yas, and witnessed by the Penghulu, Suleiman: (this document was not stamped till after the present suit was filed): the defendant states that Yas was to pay all the expenses of getting a title; that Yas gave him possession of the land about December, 1920; that he has lived on the land with his family ever since; that he never lived on his other lands; that he has never told Abdul Hamid (the Naib Penghulu) or Ahmad (the Settlement Officer) that the land belonged to Yas and that he himself was only occupying it temporarily; that he never told Abdul Hamid that he was temporarily occupying Lot 1524 as he had sold all his other lands; that he obtained official approval to occupy his 3 other pieces of land and paid rent on them; that when he approached the Penghulu about permission to occupy Lot 1524, the Penghulu told him to wait; and that when he approached Yas about a title to Lot 1524, Yas told him to wait.

Haji Suleiman, Ex-Penghulu, testifies that he witnessed the document (Ex. 6); that the defendant has lived on Lot 1524 since 1920 and did not live on his other lands.

Sujinah, defendant's wife, testifies that the defendant has lived on Lot 1524 for 17 years, except for 2 or 3 months when he lived on one of his adjoining lots.

Haji Tahir testifies that the defendant has lived on Lot 1524 for 15 years, and thar he has never lived elsewhere during that time.

Paidin testifies that the defendant has lived on Lot 1524 for 13 years, and that he has never seen him living elsewhere.

The plaintiff testifies that when he first went to visit the land he saw the defendant there; that he asked Yas what the defendant was doing on the land; that Yas said the defendant was looking after it; that the defendant overheard that conversation (which was in the Malay language) and said nothing; that he (plaintiff) concluded that the defendant was the servant of Yas: the plaintiff further testifies that at the time of the purchase he did not know that Yas had sold his rights or that anyone else had a right in the land.

Abdul Hamid, now Naib Penghulu, testifies that in 1934 he went with the Settlement Officer to demarcate the land: that the defendant was in occupation of Lot 1524: that the defendant said that the land belonged to Yas and that he (defendant) was occupying it temporarily as he had sold all his other land; that the defendant did not then show him any document; and that about 1927 or 1928 the defendant was living on his own land adjoining.

Ahmad, Settlement Officer for the past 9 years, testifies that he went to Lot 1524 on 17th April, 1934, and found the defendant on the land; that he and Abdul Hamid both asked the defendant whose land it was and that the defendant said that it belonged to Yas and that he himself was only living there temporarily; that the defendant did not say he had bought the land; and that he himself, on returning from inspecting the land on the 17th April, 1934 made a note in the Record of Settlement to the effect that "Jais states that this land belongs to Yas" (Ex. 4).

With regard to the above witnesses, my conclusions are as follows:—

I cannot rely on Haji Suleiman: he is old and illiterate: when first shown Exhibit 6 (the document of sale) he said it was a permit for Jais to clear jungle.

As to Sujinah, Haji Tahir and Paidin: they merely show that the defendant has occupied the land for many years: this may well be correct, but the material question is whether he occupied it in his own right or as the servant of Yas; and on that question they throw no light.

That leaves the defendant on the one side and the plaintiff, Abdul Hamid and Ahmad on the other: I believed the plaintiff who seemed to give his evidence in a frank and straight-forward manner: I also believed Abdul Hamid: Ahmad did and said confused and foolish things which made his evidence open to extreme suspicion, but I think he was foolish and not untruthful, and as he was corroborated by Abdul Hamid on material points, I think a jury would accept his testimony: from the demeanour of the defendant I was not able to conclude at the trial whether he was speaking truthfully or not: but I have no doubt that a jury would consider the evidence of the plaintiff, Abdul Hamid, and Ahmad as of greater cogency than that of the defendant, and I am therefore compelled to reject the defendant's testimony.

Accepting the evidence of the plaintiff, Abdul Hamid and Ahmad, I find as a fact

(1) that in 1934 the defendant said that the land belonged to Yas and that he was only occupying it temporarily

(2) that in November, 1935, the defendant acquiesced in Yas' statement that the defendant was on the land because he was looking after it.

In my opinion, the Court is justified in drawing the conclusions

(a) that the defendant admitted that he had no rights in the land; and

(b) that therefore the defendant had no rights in the land.

If I am doing an injustice to the defendant, he has only himself to blame for not stamping the agreement of sale, Exhibit 6: and if he deliberately makes untrue statements to public servants in order to avoid being penalized for illegally occupying State land, he can scarcely expect the Court to accept him as a truthful witness.

If the above conclusions are correct, the plaintiff must succeed: but it may be desirable for me to deal with the legal arguments advanced on behalf of the defendant.

First, it is contended, as I understand, that since Yas promised to transfer his rights to the defendant, those rights are automatically transferred as soon as he gets them, because equity regards as done that which ought to be done, and therefore the rights of the defendant over-ride those of the plaintiff.

The rule is given in *Halsbury's* Laws of England (2nd edition. Vol. 13. p. 123) as follows:—"in equity, if the contract is one of which specific performance would be ordered, the beneficial interest passes to the purchaser immediately on the signing of the contract, and thereupon the vendor, in regard to his legal ownership and possession of the land, becomes constructively a trustee for the purchaser".

In the present case, there seem to me three reasons for concluding that specific performance would not be ordered:—

(1) because the defendant was negligent in not getting a title: I cannot regard it as a valid excuse that Yas told him to wait:

(2) because the defendant was guilty of laches: I cannot regard it as a valid excuse that the Penghulu told him to wait:

(3) because he who seeks equity must come with clean hands: I have no doubt that the defendant knew that Yas was a trespasser on State land, and he himself was a trespasser for 15 years: I have no doubt that the defendant acquiesced in this delay in order to postpone the payment of rent, which must be paid from the time when occupation is approved: I should feel no difficulty in holding that the defendant's action was calculated to defeat the provisions of the Land Enactment, which by enacting rules for registering the occupation and ownership of land seeks to avoid exactly such a dispute as this arising from a secret assignment.

Moreover, I am in grave doubt whether the English rule of equity applies in the present case, for it only applies to contracts for sale of land, whereas the land now in question is State land and Yas, in obtaining approval to occupy, obtained not land but only contractual rights against the State.

Furthermore, in the present case, the rights of a third party are involved, and Dart *(On Vendors and Purchasers* 8th edition p. 266) states "Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property".

Secondly, it is contended on behalf of the defendant, that occupation by the defendant was constructive notice to the plaintiff that the defendant had rights in the land.

It was held in the case of *Tan Ho Cher Trading &c. v Yeo Poh* (1 Malayan Law Journal. p. 48), that occupation was sufficient notice to the plaintiff to put him on enquiry as to what were the rights or interests of the defendant, and that if he did not choose to enquire of the defendant what were his rights, the plaintiff is at fault.

In the present case, however, I have found as a fact that the defendant by his conduct admitted to the plaintiff that he had no rights in this land, and I conclude from Section 27 (b) of the Specific Relief Enactment that the rights of a transferee for value who has paid his money in good faith and without notice of the original contract are to prevail: I find that the plaintiff in the present case is such a transferee.

Thirdly, it is contended on behalf of the defendant that the agreement of sale is enforceable and that the plaintiff should sue Yas.

No doubt the plaintiff has a right of action against Yas if he fails to obtain the possession which Yas covenanted to give him: but the plaintiff is also authorized by the State to occupy this land, and I have no doubt he also has a cause of action against the person who deprives him of his right to occupy. I am therefore compelled to reject the above three contentions submitted on behalf of the defendant. If the equities were equal, the defendant would be entitled to succeed because his equity was prior in time, unless he had done something to forfeit this claim to priority: but in my opinion the rights of the plaintiff ought to prevail because "Where a purchaser, not having got in an outstanding legal estate, has nevertheless the best right to call for it, he will in equity be entitled to its protection" (Dart. *op. cit.* p. 706).

In the present case, the plaintiff has the rights of an approved occupant under Rule 7 of the Land Rules, 1929, and if he complies with the necessary formalities, he has the right to obtain a title by entry in the Mukim Register.

According to law, the plaintiff is entitled to enter into occupation of this land, and were the defendant not refusing to allow him to exercise this right, the plaintiff would at the present time have a "permanent, transmissible and transferable right, interest and occupancy" in the land.

The defendant at the present time has no legal rights at all: in law he is still a trespasser, and he remains a trespasser unless and until the Court determines that his equity is to prevail over the legal right of the plaintiff.

I conclude, then, that the plaintiff's right ought to prevail.

Indeed, I doubt whether the defendant, being a trespasser, should be allowed to rely on equity at all. I do not lose sight of Section 18 (a) of the Specific Relief Enactment, but in my opinion this provision is not intended to affect the rights of third parties. The defendant raised the defence of limitation: he contended that Article 112 of the Schedule to the Limitation Enactment as applicable: I cannot accept that contention: on the other hand, assuming that both parties are correct in thinking that this is a suit for possession of immovable property, I accept the submission of the plaintiff that Article 105 is in point; and as the plaintiff was first entitled to possession in 1935, the suit is not barred. The plaintiff invited me to hold that the defendant's agreement of sale (Ex. 6) was void under Section 23 of the Contract Enactment as being "forbidden by law" and "of such a nature that, if permitted, it would defeat the provisions of any law", since the occupation of Yas was illegal.

But I must construe Section 23 accurately: clearly the consideration of the agreement was not within the Section since it consisted of a money payment: nor do I think that the object (i.e. the purpose or design) of the agreement was within the Section, for the object of the agreement was to effect the transfer of rights when rights had been obtained: I therefore rejected this contention of the plaintiff.

Judgment accordingly.

The defendant appealed. He failed to file a memorandum of appeal and his appeal was dismissed by the Court of Appeal on the 26th March 1938.